91-759

No. _____

In The

Supreme Court of the United States

October Term, 1991

RODNEY D. BALL, SR.; HARLESS V. BELCHER; JUNIOR F. BILLINGS; LYNN S. COMBS; RONALD J. DAVIS; THEODORE H. HARRIS; JERRY W. HOLMES; EDDIE D. KIRK; LARRY E. OLIVER; GERALD H. PROFFITT; DONALD R. ROLEN; FRANK E. ROOP, JR.; JESSIE F. STAMPER; ROGER L. TAYLOR; HORACE G. WHITE, JR.; JOHNNIE WILLIAMS; ROBERT E. THOMPSON; GENEVA A. THOMPSON; WILLIAM R. LEVITT; SHIRLEY LEVITT,

Plaintiffs-Appellants,

v.

JOY TECHNOLOGIES, INCORPORATED, formerly JOY MANUFACTURING COMPANY, a Pennsylvania Corporation,

Defendant-Appellee.

Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a federal court sitting in diversity, and asked to determine a novel issue of state law, should hold that a state claim which has not been recognized by that jurisdiction's own courts, constitutes a settled question of law, which will not be disturbed absent the most compelling of circumstances.

2. Whether the lower court erred in holding that the law of West Virginia and Virginia would not permit recovery of damages for medical surveillance costs and emotional distress resulting from exposure to, and bodily absorption of, toxic chemicals.

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TABLE OF AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Plaintiffs Rodney D. Ball, *et al.*, petition the court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit (App. 1 - 8) is unreported. The opinion of the United States District Court for the Southern District of West Virginia is reported at 755 F.Supp. 1344.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit (App. 1 - 8) was entered on August 5, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 pursuant to this Court's Rule 13.1 allowing 90 days for filing a petition for a writ of certiorari.

STATEMENT OF THE CASE

These consolidated cases concern the question of how federal courts sitting in diversity should address novel issues of state law. The plaintiffs, who filed suit in the United States District Court for the Southern District of West Virginia, sought to determine their right, under West Virginia, and, in some cases Virginia law, to recover

compensation for medical surveillance costs and the emotional distress resulting from their exposure to, and absorption of, toxic chemicals.

The defendant in these cases, Joy Manufacturing Company (now Joy Technologies, Inc.), is a Pennsylvania Corporation which operated a number of facilities at which mining equipment motors using polychlorinated biphenyls (PCB's) were repaired and serviced.

Eighteen of the 20 plaintiffs in these consolidated cases have worked at either or both of the corporate defendant's facilities in Bluefield, West Virginia and Bluefield, Virginia. During their employment, as a result of the defendants' wrongful misconduct, they were occupationally (and in some cases, nonoccupationally) exposed to, and absorbed, various toxic chemicals, including polychlorinated biphenyls (PCBs), dioxins, furans, trichloroethylene (TCE), and 1, 1, 1 trichloroethane. These present and former employees seek to recover compensation for emotional distress, and for the costs of medical surveillance necessitated by their increased risk of developing cancer and other serious illnesses. They do *not* seek damages for increased risk, *per se*, or for any present illnesses. Their claims involve questions of first impression under the law of both West Virginia and Virginia.

Two of the 20 plaintiffs in these consolidated cases are spouses of past or present employees of the defendant corporation. Mrs. Levitts' claims are limited solely to loss of consortium. Mrs. Thompson, who was exposed to toxic chemicals brought home on her husband's body, clothing

and personal effects, seeks to recover for emotional distress and the cost of medical surveillance, as well as loss of consortium.

In August, 1990, the trial court informed the parties that it would grant defendants' motion for summary judgment. Shortly thereafter, plaintiffs filed a motion to certify questions of West Virginia law, and a motion to reconsider and/or amend judgment.

On September 18, 1990, the trial court entered a judgment order granting summary judgment in favor of the defendant, and dismissing plaintiffs' cases. In an associated memorandum order and opinion, the Court also denied plaintiffs' motion to certify questions of state law, and plaintiffs' motion to reconsider and/or amend judgment.

Plaintiffs' notice of appeal was filed on or about October 1, 1990. On November 19,1990, prior to any briefing or argument, plaintiffs filed a motion to certify questions of West Virginia law, together with a supporting memorandum. This motion was denied by an Order entered on December 12, 1990. On August 5, 1991, the Fourth Circuit entered an Order affirming the judgment of the trial court. Although the Fourth Circuit's unpublished opinion is not considered binding precedent under the Fourth Circuit's internal operating procedures (I.O.P.) 36.5, 36.6, it has, and will, affect decisions in the lower federal courts of that circuit. *See Watkins v. Big John Salvage Co.*, Civil Action No. 84-0145-C(s) (N.D.W.Va.) (denying motion to certify questions of state law in a case involving exposure to toxic chemicals).

REASONS FOR GRANTING THE PETITION

1. A Conflict Of Authority Has Developed Among The Federal Circuits Concerning The Proper Approach To Resolving Novel Issues Of State Law.

In recent years, the United States Court of Appeals for the Fourth Circuit has repeatedly held "that a state claim which has not been recognized by that jurisdiction's own courts constitutes a settled question of law which will not be disturbed by this court absent the most compelling of circumstances." *Tritle v. Crown Airways, Inc.*, 928 F.2d 81, 84 (4th Cir. 1990) (per curiam). *Accord Washington v. Union Carbide Corp.*, 870 F.2d 957, 962 (4th Cir. 1989). This very conservative approach to resolving state law questions of first impression has been employed even when a case has been filed in state court by the plaintiff, and removed to state court by the defendant. *See Tritle v. Crown Airways, Inc., supra.*

Other appellate courts, including the Ninth Circuit, however, have continued to recognize that "[f]ederal courts are not precluded from affording relief simply because neither the State Supreme Court nor the state legislature has enunciated a clear rule governing a particular type of controversy." *Paul v. Watchtower Bible & Tract Soc. of New York*, 819 F.2d 875, 879 (9th Cir. 1987). Federal courts may act even in the absence of "clearly established state law," and, where appropriate, "advance beyond existing state court precedent." *Id.*

In the case at bar, the trial court relied heavily on *Washington v. Union Carbide Corp.*, 870 F.2d 957 (4th Cir. 1989) and the then unpublished opinion in *Tritle v. Crown Airways, Inc.*, 928 F.2d 81 (4th Cir. 1990), *see* 755 F.Supp. at

1372-73, even though the Supreme Court of Appeals of West Virginia has earned a reputation as a very liberal, progressive court, *see Walker v. Griffith*, 626 F.Supp. 350, 353 (W.D.Va. 1986) (concluding that West Virginia courts would recognize a cause of action sounding in negligence against a tavern owner who continued to serve an intoxicated patron) (court noted that West Virginia had "been in the forefront of adapting the common law to meet today's needs" and had shown a "willingness . . . to expand the common law in the absence of specific legislative guidance"); *Blankenship v. General Motors Corp.*, 406 S.E.2d 781, 782 (W.Va. 1991) (court referred to its "wholesale updating of our tort law in the 1970's" and observed that it was obvious that "West Virginia's personal injury law has moved light years away from the doctrines applied in *McClung*" (a 1971 federal decision applying West Virginia law)), and the majority of jurisdictions addressing the issue have allowed the recovery of damages for medical surveillance costs. *See, e.g., In Re Paoli Railroad Yard PCB Litigation*, 916 F.2d 829, 849-52 (3d Cir. 1990); *cert. denied sub nom, General Electric Co. v. Knight*, 111 S.Ct. 1584 (1991); *Barth v. Firestone Tire & Rubber Co.*, 673 F.Supp. 1466 (N.D.Cal. 1987); *Ayers v. Jackson Township*, 106 N.J. 557, 525 A.2d 287 (1987); *Gerardi v. Nuclear Utility Services, Inc.*, 149 Misc.2d 657, 566 N.Y.S.2d 1002 (1991).

The trial court's conservative assessment of West Virginia and Virginia law was upheld by the circuit court, which also cited to *Washington v. Union Carbide Corp.*, 870 F.2d 957 (4th Cir. 1989).

In *Salve Regina College v. Russell*, 499 U.S. ___, 111 S.Ct. 1217, 113 L.Ed.2d 190 (1991), this court addressed

the standard of review to be used by federal appellate courts in appeals from district court determinations of state law. These consolidated cases provide an opportunity to address an equally important question concerning the proper approach for district courts to employ in resolving unsettled questions of state law in diversity cases.

2. This Case Involves An Important Question Of Federal Law With Significant Implications For Forum Shopping And Federal Removal.

As the court observed in *Paul v. Watchtower Bible & Tract Soc. of New York*, 819 F.2d 857, 879 (9th Cir. 1987):

> Were we able to invoke only clearly established state law, litigants seeking to protect their rights in federal courts by availing themselves of our diversity jurisdiction would face an inhospitable forum for claims not identical to those resolved in prior cases. Equally important, a policy by the federal courts never to advance beyond existing state court precedent would vest in defendants the power to bar the successful adjudication of plaintiffs' claims in cases with novel issues; defendants could ensure a decision in their favor simply by removing the case to federal court. Congress, in providing for removal, certainly did not intend to provide such a weapon to defendants.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

UNPUBLISHED

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

RODNEY D. BALL, SR; HARLESS V. BELCHER; JUNIOR F. BILLINGS; LYNN S. COMBS; RONALD J. DAVIS; THEODORE H. HARRIS; JERRY W. HOLMES; EDDIE D. KIRK; LARRY E. OLIVER; GERALD H. PROFFITT; DONALD R. ROLEN; FRANK E. ROOP, JR.; JESSIE F. STAMPER; ROGER L. TAYLOR; HORACE G. WHITE, JR.; JOHNNIE WILLIAMS; ROBERT E. THOMPSON; GENEVA A. THOMPSON; WILLIAM R. LEVITT; SHIRLEY LEVITT, *Plaintiffs-Appellants,* v. JOY TECHNOLOGIES, INCORPORATED, formerly Joy Manufacturing Company, a Pennsylvania Corporation, *Defendant-Appellee.*	No. 90-1537

Appeal from the United States District Court
for the Southern District of West Virginia, at Bluefield.
Elizabeth V. Hallanan, District Judge.
(CA-87-268-1, CA-88-133-1, CA-88-1691-1)

Argued: May 8, 1991

Decided: August 5, 1991

Before WILKINSON, Circuit Judge, CHAPMAN, Senior Circuit Judge, and HILTON, United States District Judge for the Eastern District of Virginia, sitting by designation.

Affirmed by unpublished opinion. Judge Hilton wrote the opinion, in which Judge Wilkinson and Senior Judge Chapman joined.

COUNSEL

ARGUED: James Anthony McKowen, HUNT & WILSON, Charleston, West Virginia, for Appellants. Dennis Charles Sauter, JACKSON & KELLY, Charleston, West Virginia, for Appellee. **ON BRIEF:** Robert L. Stewart, Jr., JACKSON & KELLY, Charleston, West Virginia, for Appellee.

OPINION

HILTON, District Judge:

The plaintiffs in this consolidated action are eighteen former employees of the defendant Joy Technologies, Inc. and two spouses of former employees. The plaintiffs allege that while employed at the defendant's corporate facilities in Bluefield, West Virginia, and Bluefield, Virginia, they were wrongfully exposed to and absorbed various toxic chemicals. The district court granted Joy's motion for summary judgment finding that the plaintiffs had not sustained any physical injury from their exposure

to toxic chemicals and having suffered no physical injury, the common law of West Virginia and Virginia would not allow them to recover damages for emotional distress or the costs of medical surveillance. The plaintiffs appealed. Finding no error in the granting of summary judgment in favor of Joy Technologies, we affirm.

I.

The defendant Joy Technologies, Inc. (hereinafter "defendant" or "Joy") began to manufacture and sell mining equipment in 1965. The mining equipment manufactured by Joy contained electric motors that used polychlorinated biphenyls (hereinafter "PCBs") as a coolant. In December of 1968, Joy purchased the Hart Electric building in Bluefield, West Virginia. Joy utilized the facility in Bluefield to repair and rebuild the motors used in the mining equipment it manufactured. The defendant used a vapor degreaser on the motors that contained trichloroethylene (hereinafter "TCE").

In 1975, Joy began construction on a new facility in Bluefield, Virginia. Joy transferred its manufacturing and repair operations to the new plant in 1988. Joy utilized a new vapor degreaser that contained 1,1,1 trichloromethane at the Bluefield, Virginia facility. The teardown and cleaning of motors continued at the Bluefield, West Virginia plant until September 1980. Joy's Bluefield, West Virginia facility was subsequently sold to Elwin Aliff.

The Bluefield, West Virginia plant was tested for PCB contamination in October, 1985. In January, 1986, the Environmental Protection Agency (hereinafter "EPA")

conducted an inspection of the West Virginia site. On February 20, 1986, the EPA issued a Superfund Cleanup order to Elwin Aliff and Lin-Elco Corporation of which Aliff was president. Aliff retained Remcor, Inc. to conduct a clean-up of the site. The clean-up effort generated publicity revealing that Joy employees had been exposed to toxic chemicals.

On March 17, 1987, sixteen former employees of Joy filed suit in the United States District Court for the Southern District of West Virginia (*Ball, et al. v. Joy Manufacturing Company*, Civil Action No. 1:87-0268). The *Ball* case was consolidated by court order on August 10, 1989, with *Thompson v. Joy Technologies, Inc.*, Civil Action No. 1:88-0133, and *Levitt v. Joy Technologies, Inc.*, Civil Action No. 1:88-1691. (The consolidated action included twenty plaintiffs, eighteen of whom were former employees of Joy at either the Bluefield, West Virginia, or Bluefield, Virginia site, while the other two plaintiffs were spouses of former employees. The plaintiffs alleged that while employed at Joy's corporate facilities in Bluefield, West Virginia, and Bluefield, Virginia, they were wrongfully exposed to and absorbed various toxic chemicals including PCBs, dioxins, furans, TCE, and 1,1,1 trichloromethane. Plaintiffs claimed that their exposure to such toxic chemicals constituted a physical injury and sought to recover damages for their resultant emotional distress and for the costs of medical surveillance allegedly necessitated by their exposure.

On September 18, 1990, the district court granted summary judgment for the defendant Joy Technologies. The district court found that the plaintiffs claimed their exposure to toxic chemicals was an injury in and of itself

and that none of the plaintiffs alleged that they sustained any physical injuries apart from their exposure. The district court concluded that the mere exposure to toxic chemicals did not constitute a physical injury. Having suffered no physical injury, the district court ruled that the common law of West Virginia and Virginia would not allow the plaintiffs to recover damages for emotional distress or the costs of medical surveillance.

II.

The plaintiffs claim that their exposure to toxic chemicals and the increased risk of developing cancer and other diseases resulting from such exposure constituted an injury that would entitle them to recover damages for emotional distress. The plaintiffs contend on appeal that the district court erred in holding that damages for emotional distress could not be recovered.

Courts in West Virginia and Virginia have recognized that damages for emotional distress may be recovered in three specific instances: (1) where the emotional disturbance results from an actual physical injury caused by the impact or occurrence of the tort; (2) where there is no initial impact or injury but physical injury thereafter results as the causal effect of the defendant's wrong; and (3) where there is no impact or physical injury but emotional disturbance results from an intentional or wanton wrongful act caused by the defendant. *Monteleone v. Cooperative Transit Co.*, 36 S.E.2d 475, 478 (W. Va. 1945); *Hughes v. Moore*, 197 S.E.2d 214, 219 (Va. 1973). Except for the intentional infliction of emotional distress, damages for

emotional distress may not be recovered under West Virginia or Virginia law absent a finding of physical injury. *Monteleone*, 36 S.E.2d at 478; *Hughes*, 197 S.E.2d at 219.

The mere exposure of the plaintiffs to toxic chemicals does not provide the requisite physical injury to entitle the plaintiffs to recover for their emotional distress. Numerous courts have held that exposure to hazardous substances does not constitute a physical injury. *See Adams v. Johns-Manville Sales Corp.*, 783 F.2d 589, 593 (5th Cir. 1986) (rejecting plaintiff's claim for mental distress damages under Louisiana law because he failed to establish that he sustained an injury from his exposure to asbestos products); *Plummer v. Abbott Laboratories*, 568 F. Supp. 920 (D.R.I. 1983) (finding that plaintiffs' ingestion of diethylstilbestrol that allegedly increased the risk of contracting cancer did not *per se* constitute a physical injury under Rhode Island law); *Sypert v. United States*, 559 F. Supp. 546 (D.D.C. 1983) (concluding that because the plaintiff had suffered no physical injury from his exposure to tubercle bacilli, he could not recover mental distress damages under Virginia law); *Eagle-Picher Industries, Inc. v. Cox*, 481 S.2d 517 (Fla. Dist. Ct. App. 1985) (holding that Florida law did not recognize inhalation of asbestos as a physical injury); *Payton v. Abbott Laboratories*, 437 N.E.2d 171 (Mass. 1982) (plaintiff's in utero exposure to diethylstilbestrol was not a physical injury or harm under Massachusetts law).

Plaintiff urges this court to expand the law of torts in West Virginia and Virginia and recognize exposure to toxic substances as a physical injury. The *Erie* doctrine permits federal courts "to rule upon state law as it presently exists and not to surmise or suggest its expansion."

Washington v. Union Carbide Corp., 870 F.2d 957, 962 (4th Cir. 1989). Because the law of West Virginia and Virginia requires physical injury before a plaintiff may recover damages for emotional distress, the district court was correct in concluding that the exposure of the plaintiffs to toxic chemicals did not constitute an injury that would entitle them to recover damages for emotional distress.

III.

The plaintiffs also claim that the district court erred in holding the costs of medical surveillance could not be recovered. In their claim for medical surveillance costs, plaintiffs seek to recover the costs of periodic medical examinations designed to monitor their health and facilitate early detection of disease caused by their exposure to toxic chemicals.

A claim for medical surveillance costs is simply a claim for future damages. Plaintiff correctly points out that the law of West Virginia allows the recovery of the reasonable value of future medical expenses necessitated by the defendant's wrong. *See, e.g., Jordan v. Bero*, 210 S.E.2d 618, 637 (W. Va. 1974). However, such relief is only available where a plaintiff has sustained a physical injury that was proximately caused by the defendant. *Jordan*, 210 S.E.2d at 637; *Long v. City of Weirton*, 214 S.E.2d 832, 860 (W. Va. 1975); *accord Hailes v. Gonzales*, 151 S.E.2d 388, 390 (Va. 1966). Plaintiffs have not demonstrated that they are suffering from a present, physical injury that would entitle them to recover medical surveillance costs under West Virginia or Virginia law.

Plaintiffs have proffered several public policy arguments for allowing individuals to recover the costs of medical monitoring where there has been no manifestation of physical injury. We agree with the district court that such considerations are better left to the respective legislatures and highest courts of West Virginia and Virginia.

For the foregoing reasons, the disposition of the case below is

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 90-1537

RODNEY D. BALL, SR., ET AL.,

Appellants,

versus

JOY TECHNOLOGIES, INC.,

Appellee.

ORDER

We have considered the motion of appellants to certify certain questions of law to the Supreme Court of Appeals of West Virginia and the response thereto. We are of opinion the motion should be denied.

It is accordingly ADJUDGED and ORDERED that the said motion to certify certain questions of law to the Supreme Court of Appeals of West Virginia shall be, and the same hereby is, denied.

With the concurrences of Judge Murnaghan and Judge Wilkinson.

/s/ H. E. Widener, Jr.
For the Court

A True Copy: Teste:

John M. Greacen, Clerk
By Cheryl Hughes
Deputy Clerk

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IN THE UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF WEST VIRGINIA
AT BLUEFIELD

RODNEY D. BALL, SR., et al.,

Plaintiffs,

v.

JOY MANUFACTURING CO.,
a Pennsylvania Corporation,

Defendant.

Civil Action
No. 1:87-0268

and

ROBERT E. THOMPSON and
GENEVA ANN THOMPSON,
Plaintiffs,

v.

JOY TECHNOLOGIES, INC.
(formerly Joy Manufacturing
Company), a Pennsylvania
Corporation,

Defendant.

Civil Action
No. 1:88-0133

and

WILLIAM R. LEVITT and
SHIRLEY LEVITT,

Plaintiffs,

v.

JOY TECHNOLOGIES, INC., a
Delaware Corporation, (formerly
Joy Manufacturing Company, a
Pennsylvania Corporation),

Defendant.

Civil Action
No. 1:88-1691

JUDGMENT ORDER

In conformity with the Order entered herein of even date herewith, it is ORDERED and ADJUDGED that judgment shall be entered in favor of the Defendant and against the Plaintiffs.

The Clerk is directed to remove this action from the docket of this Court and to mail a certified copy of this Order to counsel of record.

IT IS SO ORDERED this 18th day of September, 1990.

ENTER:

/s/ Elizabeth V. Hallanan
ELIZABETH V. HALLANAN
United States District Judge